

NO. PD-0048-19

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
SITTING AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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THOMAS DIXON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

STATE'S REPLY BRIEF

K. SUNSHINE STANEK
Criminal District Attorney
Lubbock County, Texas

BY: **LAUREN MURPHREE**
Assistant Criminal District Attorney
Lubbock County, Texas
State Bar No. 24085059
P. O. Box 10536
Lubbock, Texas 79408
Phone: (806) 775-1133
Fax: (806) 775-7930
E-mail: LMurphree@lubbockcda.com
ATTORNEY FOR THE STATE

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas, by and through the Lubbock County Criminal District Attorney, respectfully presents to this Court this State's Reply Brief in this cause.¹

¹ In light of the already-existing lengthy briefing, this State's Reply Brief is limited to clarifying the law and the facts as argued in the State's original Brief on the Merits in this cause.

I. THE PURPOSE OF THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL WAS FULFILLED.

The heart of the Sixth Amendment right to a public trial is to ensure that the accused is tried fairly. This end is accomplished by open courtrooms and the admittance of spectators, including an accused's supporters and the press. In that light, Appellant's right to public trial was not violated when—despite some temporary, partial, or inadvertent exclusions—members of the public remained in the courtroom for the duration of Appellant's trial. As emphasized in the State's Brief on the Merits, at no point during Appellant's trial was the courtroom completely closed off to the public. Members of the public remained in the courtroom at each complained-of stages of the proceeding.

Appellant devotes much of his argument to the “one-in, one-out” policy implemented by the trial court during closing arguments, complaining that because some spectators were prohibited from entering the courtroom once all of the seats were taken, his trial was no longer public.² There is great irony in the argument that a person's right to public trial can be violated when a potential spectator cannot enter a courtroom because it is *already too full* of spectators. To construe the public trial right to require that *every* potential spectator be guaranteed admittance to the proceedings—regardless of any reasonable space limitations or the number of already-present spectators—would

² Both spectators that submitted affidavits in this case regarding their exclusion testified at the motion for new trial hearing that they both were able to eventually enter the courtroom as soon as a spectator left the courtroom, pursuant to the “one in, one out” policy. (RR vol. 23, pp. 26, 31).

be the ultimate elevation of the letter of the law over the spirit of the law. It would also go far beyond any existing precedent. The core objective of the public-trial right is that enough members of the public would be present to ensure the fairness of the proceedings. When a courtroom is filled to capacity and it becomes no longer safe or practicable to continue to admit entrants, that objective has been fulfilled.

Appellant's case was tried before the 140th District Court of Lubbock County. The courtroom for the 140th District Court holds sixty people.³ To accommodate the anticipated number of attendants, Appellant's trial was physically moved to the 72nd District Court courtroom, which seats approximately 100-115 people.⁴ Even still, courthouse security was concerned about over-filling the courtroom in the event of an emergency during closing arguments.⁵ Courthouse security personnel were instructed that as soon as the courtroom reached standing-room only capacity, entrants were to be regulated using a "one in, one out" policy.⁶

Appellant suggests that the trial could have been moved to Lubbock County's "Central Jury Pool" room, located a few blocks from the Lubbock County Courthouse. At Appellant's motion for new trial hearing, the evidence showed that was not a reasonable alternative.⁷ The head of courthouse security testified that the room did not

³ (RR vol. 23, p. 32).

⁴ (RR vol. 23, p. 32, 38-39).

⁵ (RR vol. 23, pp. 39-40).

⁶ (RR vol. 23, p. 35).

⁷ (RR vol. 23, p. 43) (Q: Is the central jury pool courthouse equipped for jury trials in the way that the Lubbock courts are? A: No.).

contain proper acoustics, have the appropriate technology set up, nor did it have a projector, a bar to separate the attorneys from the gallery, or even a jury room for the jury to retire to.⁸ Counsel for appellant responded at the hearing that the room could be equipped for the trial by bringing in microphones and a projector. Appellant's argument misses the question. The question is not whether there was a bigger room; there will always be a bigger room, auditorium, or stadium. The question is whether the trial court made reasonable accommodations for the public to attend the trial. By moving the trial to the largest courtroom in the courthouse and regulating entrants only when the courtroom was full, the trial court made reasonable accommodations and did not violate Appellant's right to public trial.

II. *WALLER, PRESSLEY, LILLY*, AND THEIR PROGENY DO NOT CONTEMPLATE PARTIAL CLOSURES.

Neither the Supreme Court nor this Court has considered a less-than-complete closure. *Waller* dealt with the exclusion of all spectators from a courtroom during a motion to suppress evidence because of the sensitive and confidential nature of the evidence.⁹ Not a single member of the public outside of the parties and witnesses associated with the case were allowed into the courtroom.¹⁰ The Supreme Court held that the right to a public trial extended to motion to suppress evidence, and that closure of the courtroom violated the appellant's rights.¹¹ In *Presley*, the Supreme Court

⁸ (RR vol. 23, pp. 43-44).

⁹ *Waller v. Georgia*, 467 U.S. 39, 41-43, 104 S.Ct. 2210, 2213, 81 L.Ed.2d 31 (1984).

¹⁰ *Id.*

¹¹ *Id.* at 47.

extended its holding from *Waller* to voir dire proceedings when it held that the exclusion of Presley’s uncle from during voir dire, when no other members of the public were present during the proceeding, was a violation of Presley’s public trial right.¹² In *Lilly v. State*, this Court applied *Waller* and *Presley* to hold that a trial held at a prison chapel, behind prison security, where no members of the public attended, did not satisfy the appellant’s right to public trial.¹³ Because the facts presented by Appellant’s case are different, the test should also be different. It is precisely these different fact scenarios that every federal circuit in the nation has adopted a different test to address.

In his response brief, Appellant argues that one of those federal cases—*Osborne*—is distinguishable and that the State relies on it for the proposition that Appellant must show the closure was complete or long term.¹⁴ To the contrary, *Osborne* is a leading example of a federal court applying the substantial reason test in its holding that “a trial court should look to the particular circumstances of the case to see if the defendant will still receive the safeguards of the public trial guarantee.”¹⁵ *Osborne* is also instructive on issue of the findings requirement—in the absence of a trial court’s explicit findings, the Fifth Circuit inferred from the record that a substantial reason existed to support the partial closure.¹⁶ While the particular facts of *Osborne* are different than those in Appellant’s case, the overarching question asked is the same—short of a total

¹² *Presley v. Georgia*, 558 U.S. 209, 215-16, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010).

¹³ *Lilly v. State*, 365 S.W.3d 321, 333 (Tex. Crim. App. 2012).

¹⁴ (App. Br. at 21-22).

¹⁵ *U.S. v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).

¹⁶ *Id.* at 99.

exclusion, did the partial exclusion strike at the heart of the Sixth Amendment? If not, the Fifth Circuit (along with every other federal circuit) has held that a less stringent test than *Waller* should apply. When the substantial and de minimus standards are applied to the facts of Appellant's case, it is clear that no Sixth Amendment violation occurred.

III. CONCLUSION

Applying the *Waller* test to a situation it was never intended to apply leads to an absurd result that will have long-lasting, far-reaching, and unworkable implications for trial courts throughout the State. This Court should instead adopt the test for partial and de minimus closures used by the rest of the country and designed exactly for the facts presented by this case.

PRAYER FOR RELIEF

WHEREFORE, The State respectfully requests that the Court reverse the judgment of the Seventh Court of Appeals.

Respectfully submitted,

K. SUNSHINE STANEK

Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree

Lauren Murphree
Assistant District Attorney
State Bar No. 24085059
P. O. Box 10536

Lubbock, Texas 79408
(806) 775-1100
FAX (806) 775-7930
Attorney for the State

CERTIFICATE OF SERVICE

I certify that on August 23, 2019, a copy of this State's Reply Brief was served on opposing counsel, Cynthia Orr, via the State e-filing service. I additionally certify that on this day service was made via the State e-filing service on Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

K. SUNSHINE STANEK
Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree
Lauren Murphree

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(i)(3), I further certify that, relying on the word count of the computer program used to prepare the foregoing State's Reply Brief, this document contains 1,521 words, inclusive of all portions required by TEX. R. APP. P. 9.4(i)(1) to be included in calculation of length of the document.

K. SUNSHINE STANEK
Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree
Lauren Murphree